

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE COMMISSION’S)	
JURISDICTION OVER ELECTRIC VEHICLE)	
CHARGING STATIONS AND SERVICE PROVIDERS)	Docket No. 19-0377
)	
(Filed June 11, 2019))	

**INITIAL COMMENTS OF
THE ALLIANCE FOR TRANSPORTATION ELECTRIFICATION**

The Alliance for Transportation Electrification is pleased to be participating in this proceeding, and we strongly encourage the Commission to conclude that private entities and public entities who own and/or operate electric vehicle charging stations are not public utilities at all and do not appear to be electricity suppliers in the customary sense. Our views are informed first and foremost by our reading of the relevant regulations and caselaw, and also by our experience in the industry from the varied perspectives of our members.

I. Are private entities and/or public agencies, that are not otherwise regulated by the Commission, but own and/or operate electric vehicle charging stations in Delaware for use by the public, “public utilities” under 26 Del. C. § 102(2)?

Delaware caselaw helpfully provides a two-part test for determining who is a public utility:

1. First, the deliberative body must look at whether the activities involve the “sale of a regulated commodity” to third parties. If yes, the analysis shifts to whether the sales are such that they affect the public interest in a significant manner.
2. If the activities do involve the sale of a regulated commodity, the analysis shifts to establishing whether the sales are such that they affect the public interest in a significant manner.

At first impression, the answer to whether the transaction between EV charging service providers and drivers constitutes a sale of a regulated commodity might appear to be in the affirmative, which would dictate the remainder of this discussion. Upon closer scrutiny, however, the evidence shows that the sale of the regulated commodity more clearly takes place between the utility and the EV charging service provider, not between the charging service provider and the driver. One key factor in this conclusion is that, to date, most EV service providers do not charge by the kilowatt hour; in many cases there is no fee at all. And when customers do have to pay, there is a plethora of business models under which payment goes to a network operator, to the site host, or is split among multiple parties. Even within single networks there is a variety of service offerings for customers who pay varying amounts or not at all. Given this complexity, and the fact that the transaction is, in many cases, symbolic rather than linked to the actual cost of providing the service, EV charging is quite different from that which one would expect to see from a traditional public utility.

While we believe that the variability in the market dictates a finding, for now at least, of EV charging service providers charging EVs not being public utilities, in the event the Commission disagrees we urge the Commission to find that the history of public utility regulation and the competitive nature of EV charging clearly leads to the conclusion that such sales do not affect the public interest in a significant manner. One reason is that most EV charging takes place at home. For charging that takes place in public, sellers do not possess the type of control over consumers that exists for electric service at homes and businesses. In public, charging is being offered at more and more locations by a number of service providers offering many options that obviate the need for regulation.

Our conclusion is that the sale of a regulated commodity is often to EV charging service providers, not to drivers; when to drivers, such sales do not affect the public interest in a significant manner. Therefore, the definition of public utility is not met.

II. To the extent the Commission concludes the above-referenced entities and/or agencies are “public utilities” under 26 Del. C. § 102(2), should the Commission exercise its authority under 26 Del. C. § 201(d) to forbear from, in whole or in part, supervision and regulation of some or all of electric vehicle charging products and/or services offered by these parties?

As discussed above, EV charging service providers are not public utilities when selling to drivers because they do not satisfy the two-part test. Accordingly, there is no basis for the Commission to address the question of exercising or forbearing from exercising its authority.

III. Should the Commission deem it in the public interest to forbear with respect to the above referenced entities and/or agencies, is the Commission otherwise required to reach specific findings on the criteria enumerated in 26 Del. C. § 201(d)(5) as incorporated in PSC Order No. 9418, and, if so, whether such findings are warranted with respect to the above-referenced parties?

As discussed above, EV charging service providers are not public utilities when they sell to drivers because they do not satisfy the two-part test. Accordingly, there is no basis for the Commission to address the question of exercising or forbearing from exercising its authority.

IV. Are private entities and/or public agencies, that are not otherwise regulated by the Commission, but own and/or operate electric vehicle charging stations in Delaware for use by the public, “electric suppliers” under 26 Del. C. § 1001(14) and § 1012?

Given the age of the regulations governing electricity suppliers, it goes without saying that electric vehicle charging was not contemplated. The relevant language of § 1001(14) is that an electric supplier is one who “sells electricity to retail electric customers utilizing . . . transmission and/or distribution facilities . . .” Potential wrinkles include that many EV charging stations do not require drivers to pay for charging, and that the EV charging service provider typically sits between the distribution system and the customer, conceivably breaking the link between the customer and the distribution facilities.

Our conclusion is that EV charging service providers appear to be, though are not necessarily, electric suppliers under § 1001(14).

V. To the extent the Commission concludes the above-referenced entities and/or agencies are “electric suppliers” under 26 Del. C. § 1001(14) and § 1012, should the Commission consider amendments to Title 26, Administrative Code, § 3001 Rules for Certification and Regulation of Electric Suppliers, that are more specific to those providing such electric vehicle charging services to the public? If so, please provide specific suggestions and/or a corresponding draft regulation.

The Alliance believes the EV infrastructure market is both nascent and dynamic from a technology perspective. Moreover, as state above, different business models are being developed including discrete business models among the EV charging service providers (such as Tesla, ChargePoint, Greenlots, SemaConnect, and others), host sites that sell electricity through charging services to drivers, utilities with different use cases, and certain agencies, municipalities and cooperatives. Accordingly, we don’t believe it is either desirable or necessary at this time for the Commission to apply traditional regulation to these providers when selling services to EVs. We believe that risks to consumers and the general public are insignificant at this time.

At the same time, we believe that the Commission has a large “regulatory toolbox” that can accommodate multiple approaches and options which would serve the public interest. The Commission should ensure that if an exception is made for such electric suppliers, that the only use of electricity in these services is for EV charging services, namely for the battery capacity in the vehicle. Moreover, the Commission may want to consider some sort of “light touch” approach in which a straightforward certification process would be set forth all such suppliers to the public would be set forth. This would allow the Commission to be aware of the types and locations of public charging services in the State for planning and other purposes as EV penetration rates increase in the distribution grid which is becoming increasingly complex and capable of two-way flows of electricity in the near future. However, the rates and terms of such service would not be regulated. We believe the Commission could effectuate such a system under its existing authorities in both statute and rule.

Respectfully submitted,

/s/ *Philip B. Jones*

Philip B. Jones
Executive Director
Alliance for Transportation Electrification

Dated: September 25, 2019

CERTIFICATE OF SERVICE

I certify that on September 25, 2019, I filed the attached *Initial Comments of the Alliance for Transportation Electrification* with the Public Service Commission.

/s/ *Philip B. Jones*

Philip B. Jones
Executive Director
Alliance for Transportation Electrification